IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT COLENSO

CASE NO: LCC 74/09

In the matter of:

AMAHLUBI LAND CLAIM COMMUNITY

Concerning:

Land described by the Amahlubi Community ("Claimant Community") at the time of dispossession, as comprising areas: Elysium farms, Greenford farms, Kilpfontein farms, Drysdale farms, Ennersdale farm, Empangwene farms, Pilgrims Rest farms, Paradise farm, Lubbock farm, Waay Plaats farms and Portington farms situated in the Uthukela District

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JUDGMENT

YACOOB AJ:

1. This is an application for postponement, which comes at a late date after the matter was set down for trial for two weeks, from 23 May to 3 June 2016. Today is Thursday 2 June. The parties were aware that the trial would commence on 23 May 2016 from as far back as 9 December 2015, and the date was confirmed in a pretrial conference on 15 January 2016.

2. At the insistence of the legal representatives for the landowner, and with the support of the Commission's legal representatives, arrangements were made for the matter to be heard in Colenso. This means that the entire court, and all the legal representatives, have established themselves in Colenso for the hearing of this matter.

3. The parties met on 20 May 2016, the Friday before the trial, for substantive settlement discussions. It must be mentioned that the claimants, who are the applicants for postponement, were represented by an attorney of their own choosing, who was paid for by the Commission, but who did not appear to be very experienced, and that they only acquired counsel during the week before the trial was due to commence.

4. This Court was informed, at the first pretrial conference held after counsel was appointed, that the involvement of counsel meant that many issues were likely to be resolved, and that the trial was unlikely to take the full two weeks for which it had been set down.

5. Settlement discussions continued on 23 May, and on 24 and 25 May the legal representatives met with the leader of the claimant community, Ngonyama or Inkosi Muziwenkosi Radebe. The court had been asked not to convene just yet to permit these negotiations to continue.

6. Despite apparently positive responses by the Inkosi's advisers present at these meetings, the Inkosi requested time to consult with the claimants regarding the settlement agreement.

7. The Inkosi was given until Friday morning, 27 May 2016, to respond to the agreement. When he did not do so, he was given notice that an order would be sought in the terms of the agreement, on Monday 30 May 2016. The Court had already been requested to convene on that date.

8. The agreement deals not only with the claim by the main claimants, the amaHlubi community, but also with that of competing claimants. It is a comprehensive and complicated document, for which the Commission is to be commended in its efforts.

9. Unfortunately, the claimant community does not wish to agree to the settlement.

10. On Monday morning, 30 May 2016, this Court was informed that the claimants had terminated the mandate to its attorney and counsel, and had briefed a new attorney only that morning. That attorney, Mr Poswa, had, however been present at the settlement negotiations. He is apparently the Inkosi's legal advisor in another matter. Mr Poswa stated on Monday that the Inkosi had no objection to the settlement, but that he needed time to consult his people. He requested an adjournment of between 7 and 14 days. When it was pointed out to him that this was unreasonable, taking into account that the court had convened especially for this matter in Colenso, and that a postponement beyond the dates reserved for trial would mean a delay at least until 2017, he took instructions and proposed that the Inkosi would meet the claimants on Wednesday 1 June, and that he should respond by Friday 3 June. The other parties to the matter were opposed to an adjournment, stating that the Inkosi had asked for time the week before, and ought to have consulted in that time. Mr Poswa reported, in response to questioning by the Court, that his clients were ready to proceed with their evidence if they did not consent to the settlement.

11. The Court ruled that it would adjourn until 4pm on Wednesday afternoon, to permit the Inkosi to use Monday afternoon, Tuesday, and most of Wednesday to consult, and that if there was no agreement, the matter would proceed on Thursday morning.

12. As a result of technical difficulties, the Court was able to resume only at 6pm on Wednesday evening. Argument continued until almost 9pm, and the decision was reserved until this morning. Mr Poswa informed the Court that the claimant community had rejected the settlement agreement with contempt, for two main reasons – one was that the land which it gave them was far less in extent than what they claimed, and the second that they did not believe they needed to lease the land to the existing farmers, as, in their view, there was no specialised farming taking place which needed expert or specialised knowledge. Mr Poswa conveyed that his instructions were to request a postponement, because although his clients were ready to give evidence, he was unfamiliar with the

papers, his clients had not seen the papers, and he would like to obtain senior counsel to assist.

13. The application for postponement was vigorously opposed. The main reasons for the Commission's opposition were that the trial date has been known since December last year; that the trial will, by Friday 3 June, have cost the Commission R2 million, excluding the costs of the valuers, and that there are limited resources, both human and financial, which had to be spread over thousands of claims. The Commission had done its best to resolve the matter in a manner favourable to the claimants, and fair to everyone concerned, and submitted that a postponement would be unfair to all the other parties, the landowners and competing claimants, who would be deprived of having the matter resolved.

14. The Commission indicated that, should the postponement not be granted, and should the claimants not be ready to proceed with proving their claim, it would move for an order to be made in terms of the settlement offer, which, very broadly, included the transfer of land to both the claimant community and the competing claimants; a payment to the landowners of some R58m, and an agreement that the land would be leased to what this court understands to be the existing farmers, for a period of 9 years, renewable at the lessee's option for a further 9 years. There is also an obligation for the lessees to train members of the community to farm the land. The Commission indicated that the agreement was particularly favourable to the claimant community because, on a conspectus of the evidence which was to be presented to this court, the Commission's opinion is that the claimants would have difficulty proving their claim, and in any event would not be able prove an entitlement to more land than the proposed settlement gave them.

15. Those landowners represented by Mr Roberts SC indicated that they would ask for the claim to be dismissed if the postponement was not granted and the claimants were unable to proceed.

16. Both the Commission and the landowners represented by Mr Roberts SC submitted that, if a postponement was granted, a costs order should be made against the claimant community, despite the policy and practice in this court that costs are not ordinarily granted against a claimant community.

17. Ms Norman SC, for the seventeenth, nineteenth and twentieth defendants, who are landowner communities, submitted that the requirements for a postponement have not been met, and relied on the judgment of *Magistrate Pangarker v Botha and Another* 2015 (1) SA 503 (SCA), at [23]-[27], in which the well-established requirements for a postponement are set out.

18. There can be no dispute that a postponement cannot be claimed as a right. It is an indulgence granted by the Court exercising its discretion, and ordinarily a reasonable explanation is required, together with a tender for costs which would attenuate the prejudice of the other party.

19. It must also be taken into account that, in the words of Harms JA, referred to at paragraph [26] of the *Pangarker* judgment, it is "one of the oldest tricks in the book" to terminate the mandate of one's legal representatives in order to obtain a postponement.

20. Further, in this Court, the factors listed in *Kara NO and Others v Department of Land Affairs* 2005 (6) SA 563 (LCC) are relevant. That is, that this Court does not have a continuous roll; that a hearing away from the seat of the Court involves cumbersome and time-consuming logistical arrangements, and that hearings away from the seat of the Court are only set after pre-trial conferences to ensure availability and readiness, to avoid waste of human and financial resources.

21. Having considered all of this, and despite it, it is this Court's view that in this case the dictates of fairness and justice require that a postponement be granted. It is our view that the rejection of the settlement agreement by the claimants is not unreasonable. If the claimants' previous legal representatives were convinced that the settlement was best for the claimants, which they informed this court they were, the claimants were entitled to change to legal representation they

felt would best represent their interests. The repeated requests by the Inkosi for time to consult cannot be interpreted as a representation that consultation would result in the acceptance of the settlement agreement. The settlement negotiations started very close to the time for which the trial was set down, and that is not the fault of the claimants.

22. In determining whether a postponement would be fair and just, it is necessary for this Court to consider what would happen if no postponement was granted. The claimants would have to proceed without counsel, with a legal representative who has not been able to prepare, and would possibly not be able to present their case. An application would be made either for the claim to be dismissed entirely, or for the proposed settlement agreement to be made an order of Court.

23. I consider first the settlement agreement.

24. This Court is indebted to the Commission and its legal representatives for their tireless efforts in investigating the claim and in negotiating what, if all other things had been equal, appears to be a fair and generous settlement agreement in difficult circumstances.

25. However, all other things are not equal. The claimants do not wish to lease the land to the farmers. The agreement provides that, should the claimants not enter into a lease agreement, the Commission will do so on their behalf, and will cede the rental to them. In effect, the State will administer the land for the benefit of the claimants, against their wishes. This arrangement will endure for a minimum of 9 years, but if the lessees wish it, for 18 years. It was a condition of the landowners agreeing to the settlement.

26. This would not be the first time that the State has administered land for the benefit of the people who live on it, and who have been prevented from exercising their rights in land. The arrangement raises the spectre of the history of the dispossession in this country including the Native Trust and Land Act, and the South African Development Trust. See in this regard *Msunduzi Municipality v*

MEC for Housing, Kwa-Zulu- Natal and Others 2004 (6) SA 1 (SCA) at [6] and *Ethekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) at [2].

27. This Court is not inclined to force this arrangement on unwilling claimants. Mr Poswa indicated that his clients would rather not get anything than be subjected to this order. They are aware of the risk they are taking and must be allowed to take it.

28. The Court must therefore weigh up the prejudice between dismissing the claim in its entirety and granting the postponement.

29. The prejudice to the claimants in having their claim dismissed without being considered is obvious. Despite the compelling arguments by Mr Dodson SC regarding the prejudice to the Commission, the landowners, and the competing claimants, it is our view that the claimants must be permitted a proper hearing, and an opportunity to prove their claim. It is unfortunate that they only obtained counsel late, and it is equally unfortunate that settlement negotiations only began in earnest late. The waste of both financial and human resources is not insignificant, but it is this Court's view that the prejudice to the claimants if the postponement were not granted is greater.

30. In the circumstances, the postponement is granted.

31. However, to alleviate the not inconsiderable prejudice that is caused by the postponement, the amaHlubi community is ordered to pay the costs for three days of the hearing. This is because there is no reason why the Inkosi could not have made a concerted effort to consult with his people before Monday 30 May, from Thursday 26 May to Sunday 29 May. The time taken to consult during this week was unnecessary and led to a delay of three days.

32. Although it is usual in this Court not to grant costs orders against claimants, it is not unheard of, and there have been cases, for example the *Kara* case referred to above, in which the claimants have tendered costs when asking for a

postponement and tender accepted. It is this court's view that this case presents special circumstances which justify a limited costs order against the claimants.

33. I therefore make the following order:

a. The matter is postponed *sine die*.

b. The amaHlubi claimant community is to pay the costs for three days of the hearing of this matter.

S Yacoob

Acting Judge, Land Claims Court

I agree.

MP Canca

Acting Judge, Land Claims Court

I agree.

pp

CE Loots

Assessor